



12 CFR Parts 303 and 308

RIN 3064-AF92

Fair Hiring in Banking Act

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) proposes to revise its regulations to conform with the Fair Hiring in Banking Act (FHBA)—which was enacted on and immediately effective as of December 23, 2022. Among other provisions, the FHBA excluded or exempted categories of otherwise-covered offenses from the scope of statutory prohibitions on participation in banking. These categories pertain to certain older offenses, offenses committed by individuals 21 or younger, and “certain lesser offenses.” The FHBA also clarified several definitions in section 19 and provided application-processing procedures. The FDIC considers most of the proposed revisions to its regulations to be required by the FHBA. Other proposed revisions reflect the FDIC’s interpretation of statutory prohibitions in light of the FHBA.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3064-AF92, by any of the following methods:

- *FDIC Website:* <https://www.fdic.gov/resources/regulations/federal-register-publications/>. Follow instructions for submitting comments on the agency website.
- *Email:* comments@fdic.gov. Include RIN 3064-AF92 on the subject line of the message.
- *Mail:* James P. Sheesley, Assistant Executive Secretary, Attention: Comments

RIN 3064-AF92, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

- *Hand Delivery to FDIC:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure.

- *Public Inspection:* Comments received, including any personal information provided, may be posted without change to

<https://www.fdic.gov/resources/regulations/federal-register-publications/>.

Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this document will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Timothy Schuett, Senior Review Examiner, 763-614-9473, tschuett@fdic.gov; Brian Zeller, Review Examiner, 571-345-8170, bzeller@fdic.gov, Division of Risk Management Supervision; or Graham Rehrig, Counsel, 703-314-3401, grehrig@fdic.gov, Legal Division.

SUPPLEMENTARY INFORMATION:

I. Background

Section 19 of the Federal Deposit Insurance Act (section 19)¹ prohibits, without the prior written consent of the FDIC (the FDIC refers to applications for such consent as “consent applications”), the participation in banking by any person who has been convicted of a crime involving dishonesty or breach of trust or money laundering or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution for such an offense (collectively, covered offenses). Further, this law forbids an insured depository institution (IDI) from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. Section 19 also imposes a separate ten-year ban for a person convicted of certain crimes enumerated in Title 18 of the United States Code, which can be removed only upon a motion by the FDIC and approval by the sentencing court.

From 1998 until 2020, the FDIC had a Statement of Policy that was issued related to section 19, occasionally revised, and published in the *Federal Register*.² The purpose of the Statement of Policy, as amended through the years, was “to provide the public with guidance relating to section 19 and the FDIC’s application thereof.”³ In 2020, following notice and comment, the FDIC revised and codified the Statement of Policy into the FDIC’s Filing Procedures under 12 CFR part 303, subpart L, and Rules of Practice and Procedure under part 308, subpart M (2020 Final Rule).⁴

On December 23, 2022, the President signed into law the Fair Hiring in Banking Act FHBA,⁵ which significantly revised section 19 and was effective immediately. The

¹ 12 U.S.C. 1829.

² See 63 FR 66177 (Dec. 1, 1998); 72 FR 73823 (Dec. 8, 2007) with correction issued at 73 FR 5270 (Oct. 13, 2008); 76 FR 28031 (May 13, 2011); 77 FR 74847 (Dec. 18, 2012); 83 FR 38143 (Aug. 3, 2018).

³ See 84 FR 68353.

⁴ See 85 FR 51312 (Aug. 20, 2020).

⁵ The FHBA appears at section 5705 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395, 3411.

FHBA created several categories of exceptions or exemptions to the prohibition on participating in banking, including the following:

- *Certain older offenses:* (1) if it has been 7 years or more since the offense occurred; (2) if the individual was incarcerated with respect to the offense and it has been 5 years or more since the individual was released from incarceration; or (3) for individuals who committed an offense when they were 21 years of age or younger, if it has been more than 30 months since the sentencing occurred.⁶

- *Offenses for which an order of expungement, sealing, or dismissal has been issued* in regard to the conviction in connection with such offense and it is intended by the language in the order itself, or in the legislative provisions under which the order was issued, that the conviction shall be destroyed or sealed from the individual's State, Tribal, or Federal record even if exceptions allow the record to be considered for certain character and fitness evaluation purposes.

- *"Designated lesser offenses,"* including the use of fake identification, shoplifting, trespass, fare evasion, driving with an expired license or tag (and such other low-risk offenses as the FDIC may designate), if 1 year or more has passed since the applicable conviction or program entry.

- *Misdemeanor criminal offenses involving dishonesty,* if the offense was committed more than one year before the date on which an individual files a consent application,⁷ excluding any period of incarceration.

- *A criminal offense involving dishonesty that also "involv[es] the possession of controlled substances."*

The FHBA clarifies several terms in section 19, including "criminal offense

⁶ These exceptions do not apply to the offenses described under 12 U.S.C. 1829(a)(2).

⁷ Under the FHBA, a "consent application" "means an application filed with [the FDIC] by an individual (or by an insured depository institution or depository institution holding company on behalf of an individual) seeking the written consent of the [FDIC] under [12 U.S.C. 1829(a)(1)]." 12 U.S.C. 1829(g)(1).

involving dishonesty” and “pretrial diversion or similar program.” It also provides conditions regarding *de minimis* offenses, to the extent the FDIC provides *de minimis* exemptions by rule.

The FHBA codifies procedures for consent applications filed with the FDIC. It requires the FDIC to make all forms and instructions related to consent applications available to the public, including on the FDIC’s website. It requires the FDIC to primarily rely on the criminal history record of the Federal Bureau of Investigation when evaluating consent applications and to provide such records to the applicant to review for accuracy. Further, it requires the FDIC to assess evidence of an individual’s rehabilitation including: the applicant’s age at the time of the conviction or program entry; the time that has elapsed since conviction or program entry; and the relationship of an individual’s offense to the responsibilities of the applicable position. Other information, including an individual’s employment history, letters of recommendation, certificates documenting participation in substance abuse programs, successful participation in job preparation and educational programs, other relevant evidence, and any additional information the FDIC determines necessary for safety and soundness shall also be considered.

II. Discussion of Proposed Amendments

The proposed amendments to the FDIC’s section 19 regulations are primarily intended to align the regulations with the FHBA’s provisions. The proposed amendments address, among other topics, the types of offenses covered by section 19, the effect of the completion of sentencing or pretrial-diversion program requirements in the context of section 19, and the FDIC’s procedures for reviewing applications filed under section 19. Furthermore, in developing these proposed amendments, the FDIC has consulted and coordinated with the National Credit Union Administration, the Board of Governors of

the Federal Reserve System (FRB), and the Office of the Comptroller of the Currency “to promote consistent implementation [of the FHBA] where appropriate.”⁸

Significant proposed revisions⁹ include the following:

A. Revised provisions of 12 CFR part 303, subpart L

1. Section 303.220 What is section 19 of the Federal Deposit Insurance Act?

The FDIC proposes revising paragraph (b) of this section to clarify that IDIs must make a reasonable, documented inquiry to verify an applicant’s history to ensure that a person who has a covered offense on the person’s record is not hired or permitted to participate in its affairs without the written consent of the FDIC.

2. Section 303.221 Who is covered by section 19?

The FDIC proposes to revise paragraph (d) of this section to more closely align its restrictions with the analogous FRB regulations under 12 CFR 225.41 and 238.31 and the FDIC’s regulations under 12 CFR part 303, subpart E, concerning Change in Bank Control applications. A person will be deemed to exercise “control” if that person: (1) has the ability to direct the management or policies of an IDI; (2) has the power to vote 25 percent or more of the voting shares of an IDI; or (3) has the power to vote 10 percent of the voting shares of an IDI if: (a) no other person owns, controls, or has the power to vote more shares; or (b) the institution has registered securities under section 12 of the Securities Exchange Act of 1934.¹⁰ Under the same standards, a person will be deemed to “own” an IDI if that person owns: (1) 25 percent or more of the institution’s voting stock; or (2) 10 percent of the voting shares if: (a) no other person owns more; or (b) the institution has registered securities under section 12 of the Securities Exchange Act of

⁸ See 12 U.S.C. 1829(f)(9) (“In carrying out this section, the [FDIC] shall consult and coordinate with the National Credit Union Administration as needed to promote consistent implementation where appropriate”).

⁹ The proposed rule would also make a number of non-substantive, technical edits to the section 19 regulations that are not discussed in this section.

¹⁰ 15 U.S.C. 78l.

1934. Paragraph (d) retains language concerning individuals acting in concert with others so as to have such ownership or control.

3. Section 303.222 Which offenses qualify as “Covered Offenses” under section 19?

The proposed revisions to paragraph (a) of this section would reflect the new statutory definition of “criminal offense involving dishonesty.”¹¹ The FHBA excludes from the scope of such offenses “an offense involving the possession of controlled substances.”¹² The FDIC interprets this phrase concerning controlled substances to exclude, at a minimum, criminal offenses involving the simple possession of controlled substances and possession with intent to distribute a controlled substance. This exclusion may also apply to other drug-related offenses depending on the statutory elements of the offenses or from court determinations that the statutory provisions of the offenses do not involve dishonesty, breach of trust, or money laundering. Potential applicants may contact their appropriate FDIC Regional Office if they have questions about whether their offenses are covered under section 19.

This revised regulatory language would mark a shift from the FDIC’s current section 19 regulations, which require an application for all convictions and pretrial diversions concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances. The FDIC believes that this proposed revision would be consistent with the text and purposes of the FHBA, would align the FDIC’s interpretation of section 19 as to offenses involving controlled substances more closely with other Federal banking regulators, and continue to recognize that a drug-related offense could potentially involve dishonesty, breach of trust, or money laundering. The FDIC also notes that this proposed revision to its section 19 regulations would *not* affect the FDIC’s

¹¹ See 12 U.S.C. 1829(g)(2).

¹² 12 U.S.C. 1829(g)(2)(C)(ii).

ability to consider drug-related offenses, as they pertain to the suitability of an individual, under other statutory provisions, including the Change in Bank Control Act and section 32 of the FDI Act.

The FHBA also states that the term “criminal offense involving dishonesty” does not include “a misdemeanor criminal offense committed more than one year before the date on which an individual files a consent application, excluding any period of incarceration.”¹³ The FDIC interprets the term “offense committed” to mean the “last date of the underlying misconduct,” based on the plain text of the statute. In instances with multiple offenses, “offense committed” means the last date of any of the underlying offenses.

Revised paragraph (c) would include new language reflecting the statute’s exception of certain older offenses from the scope of section 19.¹⁴ Among other exceptions, the FHBA states that section 19’s restrictions will not apply to an offense if “it has been 7 years or more since the offense occurred.”¹⁵ The FDIC considers the phrases “offense committed”—noted above—and “offense occurred” to be substantially similar. Accordingly, the FDIC interprets the term “offense occurred” to mean the “last date of the underlying misconduct.” In instances with multiple offenses, “offense occurred” means the last date of any of the underlying offenses. Revised paragraph (c) contains another FHBA exception: section 19’s restrictions would not apply to an offense if “the individual was incarcerated with respect to the offense and it has been 5 years or more since the individual was released from incarceration.”¹⁶ While the language of the statute is clear, the FDIC notes that there could be situations in which an individual who was incarcerated with respect to an offense would be permitted to work at a bank before a similarly situated individual who was not incarcerated in connection with an offense.

¹³ 12 U.S.C. 1829(g)(2)(C)(i).

¹⁴ See 12 U.S.C. 1829(c)(1).

¹⁵ See 12 U.S.C. 1829(c)(1)(A)(i).

¹⁶ See 12 U.S.C. 1829(c)(1)(A)(ii).

Revised paragraph (c) also tracks the FHBA’s language concerning offenses committed by individuals 21 years of age or younger. The FHBA states that, for individuals who committed an offense when the individual was 21 years of age or younger, section 19 shall not apply to the offense if it has been more than 30 months since the sentencing occurred.¹⁷ The FDIC interprets “sentencing occurred” to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed. Moreover, revised paragraph (c) notes that its exclusions—which are derived from the FHBA—do not apply to the enumerated offenses described under 12 U.S.C. 1829(a)(2).¹⁸

Revised paragraph (d) excludes “designated lesser offenses” (for example, using fake identification), as specified in 12 U.S.C. 1829(c)(3)(D), if one year or more has passed since the applicable conviction or program entry.

Revised paragraph (e) adds language to codify the FDIC’s long-held position that individuals who are convicted of or enter into a pretrial diversion program for a criminal offense involving dishonesty, breach of trust, or money laundering in foreign jurisdictions are subject to section 19, unless the offense is otherwise excluded by 12 CFR part 303, subpart L. For example, if an IDI has operations outside the United States, the IDI could conduct a reasonable, documented inquiry to verify an applicant’s history, in accordance with 12 CFR 303.220, by inquiring about potential covered offenses that may have occurred in that foreign country (or countries) in which the IDI conducts operations, as well as in the United States. As another example of such an inquiry, if an IDI plans to hire someone in the United States who is from a foreign country, the IDI could inquire about potential covered offenses that may have occurred in the United States and in that foreign country.

4. Section 303.223 What constitutes a conviction under section 19?

¹⁷ 12 U.S.C. 1829(c)(1)(B).

¹⁸ See 12 U.S.C. 1829(c)(1)(C).

Paragraph (c) of this section has been revised to reflect statutory language related to the treatment of orders of expungement, sealing, or dismissal of criminal records.¹⁹ The FHBA provides a two-pronged test to determine whether a covered offense should be considered expunged, dismissed, or sealed and therefore excluded from the scope of section 19. First, there must be an “order of expungement, sealing, or dismissal that has been issued in regard to the conviction in connection with such offense”; second, it must be “intended by the language in the order itself, or in the legislative provisions under which the order was issued, that the conviction shall be destroyed or sealed from the individual’s State, Tribal, or Federal record, even if exceptions allow the record to be considered for certain character and fitness evaluation purposes.”²⁰ The statute does not address expungements, sealings, or dismissals by operation of law, and the FDIC has sought to harmonize its current regulations concerning expunged and sealed records with the statutory language to provide a more comprehensive framework as to such records. The FDIC has also added language to the second (intent) prong of the expungement framework to encompass the language in the expungement order itself, the legislative provisions under which the order was issued, *and other legislative provisions*. This proposed revision also seeks to harmonize the FDIC’s current regulations concerning expungements with the FHBA’s provisions. The FDIC believes that all of the additional language is consistent with the purposes of the statute.

Revised paragraph (d) clarifies that it encompasses the terms “youthful offender” and “juvenile delinquent” *and similar terms*, since a court does not have to specifically use these terms in an adjudication in order for paragraph (d)’s provisions to apply.

5. Section 303.224 What constitutes a pretrial diversion or similar program (program entry) under section 19?

¹⁹ See 12 U.S.C. 1829(c)(2).

²⁰ 12 U.S.C. 1829(c)(2).

This section has been revised to reflect the statutory definition of “pretrial diversion or similar program.”²¹

6. Section 303.225 What are the types of applications that can be filed?

This section has been revised to reflect the updated statutory filing procedures. The statute removes the FDIC’s former policy that an institution sponsor a consent application or that an individual seek a waiver of the institution filing requirement. Moreover, the statute enables a depository institution holding company to file an application on behalf of an individual (previously, only IDIs could file such sponsored applications).²² In order to avoid duplication of applications filed with the FRB and the FDIC, revised paragraph (a) states that the FDIC will accept applications from: an individual; an IDI applying on behalf of an individual; a depository institution holding company applying on behalf of an individual with respect to a depository institution subsidiary of the holding company; and a depository institution holding company applying on behalf of an individual who will work at the holding company but also participate in the affairs of the IDI or who would be in a position to influence or control the management or affairs of the IDI, in accordance with 12 CFR 303.221(a).

Revised paragraph (b), consistent with the FHBA, states that an individual or an institution may file applications at separate times. Under either approach, the application(s) must be filed with the appropriate FDIC Regional Office.²³

7. Section 303.226 When may an application be filed?

This revised section notes that, before an application may be filed, “all of the sentencing requirements associated with a conviction, or conditions imposed by the program entry, including but not limited to, imprisonment, fines, condition of

²¹ See 12 U.S.C. 1829(g)(3).

²² See 12 U.S.C. 1829(f)(1).

²³ See 12 U.S.C. 1829(f)(1).

rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction.” The FDIC proposes to include this revised language to accord with several of the FHBA’s exclusions from section 19 that are not tied to the completion of sentencing requirements.

Furthermore, the FHBA requires the FDIC to “make all forms and instructions related to consent applications available to the public, including on the website of the Corporation.”²⁴ These forms and instructions “shall provide a sample cover letter and a comprehensive list of items that may accompany the application, including clear guidance on evidence that may support a finding of rehabilitation.”²⁵ While the FDIC has not explicitly mentioned these requirements in its regulations, the agency will comply with them.

8. Section 303.227 *De minimis* offenses

The FDIC proposes to retitle this section to avoid confusion between “designated lesser offenses” and “*de minimis* offenses.” This section’s current title is, “When is an application not required for a covered offense or program entry (*De minimis* offenses)?” The FHBA includes “designated lesser offenses,” which offenses are excluded from the scope of section 19 (that is, they are not considered *de minimis* offenses—which offenses are considered covered offenses for which no application is required because the application is deemed automatically granted). The FDIC believes that the current title would cause confusion for a reader and therefore proposes retitling this section.

The FHBA removed the use of fake identification from the scope of section 19, and revised paragraphs (a)(1) and (b)(4) reflect this exclusion.²⁶ Revised paragraph (a)(2) would reflect the FHBA’s confinement criteria as to the FDIC’s determination of *de minimis* offenses.²⁷

²⁴ 12 U.S.C. 1829(f)(5)(A).

²⁵ 12 U.S.C. 1829(f)(5)(B).

²⁶ See 12 U.S.C. 1829(c)(3)(D).

²⁷ See 12 U.S.C. 1829(c)(3)(B).

The FDIC proposes to revise the *de minimis* requirement related to the aggregate total face value of all “bad” or insufficient funds checks in paragraph (b)(2)(i) from \$1,000 to \$2,000 to conform with the statute.²⁸

9. Section 303.228 How to file an application.

This revised section would eliminate the institution filing requirement and waiver process and indicate that an “institution”—an IDI or a depository institution holding company—could file an application on behalf of an individual, rather than just an IDI. Both of these proposed revisions are due to the updated statutory language.²⁹ This revised section would also clarify that the appropriate FDIC Regional Office for an institution-sponsored application would be the office covering the state where the institution’s home office is located and that the appropriate FDIC Regional Office for an individual application would be the office covering the state where the person resides.

10. Section 303.229 How an application is evaluated.

Revised paragraph (a) would reflect new statutory requirements related to the FDIC’s review process, including the requirement that the FDIC primarily rely on the criminal history record of the Federal Bureau of Investigation in the FDIC’s review and provide such record to the applicant to review for accuracy.³⁰ The FDIC interprets the term “criminal history record” to mean “identity history summary checks,” which are commonly known as “rap sheets.” Under revised paragraph (a)—and in accordance with the FHBA—the FDIC, in reviewing a consent application, would provide a copy of the rap sheet to an applicant to review for accuracy.³¹

Revised paragraph (b) would state that the FDIC will not require an applicant to provide certified copies of criminal history records unless the FDIC determines that there is a clear and compelling justification to require additional information to verify the

²⁸ See 12 U.S.C. 1829(c)(3)(C).

²⁹ See 12 U.S.C. 1829(f)(1).

³⁰ See 12 U.S.C. 1829(f)(6)(A)(i).

³¹ See 12 U.S.C. 1829(f)(6)(A)(ii).

accuracy of the criminal history record of the Federal Bureau of Investigation (that is, the rap sheet).³²

Revised paragraph (d) would clarify how the FDIC will evaluate evidence of rehabilitation and other evidence, as required by the FHBA.³³

Revised paragraph (g) would eliminate references to the former application-waiver requirement.

Finally, revised paragraph (h) would incorporate statutory language explaining when a new institution-sponsored application would be necessary due to changes in the scope of an applicant's employment.³⁴

11. Section 303.231 Waiting time for a subsequent application if an application is denied.

This section, as currently written and among other provisions, requires a one-year waiting period to file a consent application, following the issuance of a decision denying such an application. The proposed rule would retain the existing regulatory text as paragraph (a) and create a new paragraph (b)—which would note that an institution-sponsored application is not subject to the one-year waiting period if the application (1) follows the denial of an individual application, or (2) follows the denial of an institution-sponsored application and the subsequent application is sponsored by a different institution or is for a different position.

B. Revised provisions of 12 CFR part 308, subpart M

The proposed rule would make several technical amendments to §§ 308.156 and 308.158 to encompass applications that are sponsored by depository institution holding companies, clarify two sentences concerning hearing procedures, and use more consistent

³² 12 U.S.C. 1829(f)(6)(B).

³³ 12 U.S.C. 1829(f)(7). While the statute uses the terms “rehabilitation” and “mitigating” as separate categories of evidence, the terms appear to be substantially similar, in the context of section 19 applications, and the use of both terms in these regulations may create confusion. Therefore, the proposed rule uses the term rehabilitation not mitigating.

³⁴ See 12 U.S.C. 1829(f)(8).

terminology.

III. Expected Effects

As previously discussed, the proposed rule would align the FDIC's regulations with the FHBA's provisions, make additional changes to further clarify the FDIC's regulations related to section 19, more closely align the FDIC's section 19 regulations with those of other Federal financial regulators, and make a number of non-substantive, technical edits. As of the quarter ending June 30, 2023, there were 4,654 FDIC-insured depository institutions, all of which are covered by the rule and therefore could be affected.³⁵ Additionally, the rule will apply to persons covered by the provisions of section 19, including those who are or wish to become employees, officers, directors, or controlling shareholders of an IDI or who otherwise are or wish to become an institution-affiliated party (IAP) of an IDI.

To estimate the number of institutions and individuals affected by the rule, the FDIC counted the number of section 19 applications it has received between 2020 and 2022. Over this period, the FDIC received 27 bank-sponsored section 19 applications, an average of 9 per year. Additionally, the FDIC received 202 individual section 19 applications during the same period, an average of approximately 67 per year.³⁶ Therefore, the FDIC estimates that the proposed rule could affect at least 9 FDIC-insured depository institutions and 67 individuals per year. Assuming that each application involves a different institution, approximately 2 percent of insured institutions, or 76, could be affected per year on average.³⁷

As previously described, the proposed rule would align the FDIC's regulations with the FHBA's provisions. In particular, the FHBA created several categories of exceptions or exemptions to the prohibition on participating in banking. The proposed

³⁵ FDIC Call Report data, March 31, 2023.

³⁶ FDIC Application Tracking System.

³⁷ $(76/4,654) * 100 = 1.6$ percent.

rule would incorporate these categories of exemptions and exceptions. The FDIC believes that the additional categories for exceptions or exemptions to the prohibition on participating in banking established by the FHBA could benefit certain individuals and IDIs by reducing the number of applications they would otherwise be required to file under section 19. Additionally, the categories of exceptions or exemptions to the prohibition on participating in banking established by the FHBA could benefit IDIs by marginally expanding the supply of labor available. However, these changes were created by the FHBA and were effective immediately upon passage, and the proposed rule aligns the FDIC's regulations with these elements of the FHBA; therefore, the associated changes in the proposed rule will have no direct effect on individuals or IDIs.

The proposed rule would amend the FDIC's existing section 19 application-procedure regulations to incorporate the FHBA's provisions. The FDIC's current section 19 regulations contain references to existing application procedures that are similar in substance to those established by FHBA. However, the FHBA, among other requirements, compels the FDIC to primarily rely on the criminal history record of the Federal Bureau of Investigation when reviewing consent applications. It is the current practice of the FDIC to consider all relevant information when evaluating a section 19 application. However, the establishment of a common source of criminal history, together with only requiring certified copies of criminal history records if there exists clear and compelling justification for doing so, could benefit certain individuals and IDIs by marginally reducing the volume of information they need to supply to the FDIC. The FDIC believes that, while these proposed changes to the application procedures will directly affect certain individuals and institutions that file section 19 applications, they may not have a substantial effect on potential applicants. Finally, these changes were created by the FHBA and were effective immediately upon passage, and the proposed rule aligns the FDIC's regulations with these elements of the FHBA; therefore, the

associated changes in the proposed rule will have no direct effect on individuals or IDIs.

Finally, in seeking to align its section 19 regulations with the provisions of the FHBA, the FDIC used its discretion to marginally increase the scope of certain terms so as to better reflect the purposes of the FHBA. In particular, the FDIC has provided broader language as to the scope of expunged, sealed, or dismissed offenses. This aspect of the proposed rule could potentially benefit persons covered by the provisions of section 19, including individuals who are or wish to become employees, officers, directors, or controlling shareholders of an IDI, or who otherwise are or wish to become an IAP of an IDI. However, given that most of the proposed amendments are focused on aligning the FDIC's regulations with the FHBA, the marginal effect of this aspect of the proposed rule is likely to be small.

The FDIC invites comments on all aspects of this analysis. In particular, would the proposed rule have any costs or benefits that the FDIC has not identified?

IV. Alternatives

As discussed above, almost all of the proposed substantive changes stem from the FHBA's revisions to section 19. The FDIC does not have discretion in considering alternatives to those statutory revisions. The FDIC has, however, proposed several clarifications and interpretations to its section 19 regulations. For example, the FDIC has provided broader language as to the scope of expunged, sealed, or dismissed offenses. The FDIC considered whether to simply provide the statutory definition for such offenses. The FDIC chose to propose the inclusion of more expansive language, in the interest of harmonizing the FDIC's existing regulations with the revisions to section 19, and under the belief that this language would be consistent with the purposes of the FHBA. The FDIC invites comments on its consideration of alternatives. In particular, are there other alternatives that the FDIC should consider?

V. Request for Comments

1. The FDIC seeks comments on all aspects of its approach to section 19 and more specifically on the questions that follow.

2. *Offense date.* As revised, section 19 provides for an exception for an offense if “it has been 7 years or more since the offense occurred.”³⁸ There is a similar provision that removes from the definition of “criminal offense involving dishonesty” “a misdemeanor criminal offense committed more than one year before the date on which an individual files a consent application, excluding any period of incarceration[.]”³⁹

Historically, the FDIC’s position has been that actions do not amount to a covered “offense,” for section 19 purposes, until there has been either a conviction via a guilty plea, finding of guilt, or an entry into a pretrial-diversion program. This is because culpability and responsibility for the actions do not attach until one of those events occurs.⁴⁰ However, for purposes of evaluating whether the seven-year or one-year exception applies, the FDIC must evaluate if it has been seven years or more since the “offense occurred” or whether the “offense [was] committed more than one year before the date on which an individual files a consent application, excluding any period of incarceration.” The FDIC proposes to interpret the phrases “offense occurred” and “offenses committed” as the “last date of the underlying misconduct” given the text of the statute. (In instances with multiple offenses, “offense occurred” or “offense committed” would mean the last date of any of the underlying offenses.) However, the FDIC acknowledges that there may be other, supportable interpretations of this phrase. For example, the FDIC is aware of legislative history indicating that the timeframes established by the FHBA were chosen because of their relation to an individual’s

³⁸ 12 U.S.C. 1829(c)(1).

³⁹ 12 U.S.C. 1829(g)(2)(C)(i).

⁴⁰ See 12 CFR 303.223(a) (2020). (“There must be a conviction of record. Section 19 does not cover arrests or pending cases not brought to trial, unless the person has a program entry as set out in § 303.224.”). The FDIC’s current section 19 regulations only focus on underlying misconduct in the context of *de minimis* offenses for individuals who were 21 years of age or younger when the “actions that resulted in [the] conviction[] or program entr[y] all occurred.” See 12 CFR 303.227(b)(1).

likelihood of rehabilitation and that an individual's rehabilitation likely only begins with conviction or program entry, rather than the date of their misconduct. As such, the FDIC seeks public comment on the following topic: Is the FDIC's interpretation of the phrases "offense occurred" and "offense committed" as the "last date of underlying misconduct" appropriate or are there other interpretations the FDIC should consider? What support do commenters have for other interpretations given the language of the statute?

3. "*Sentencing occurred.*" The FHBA exempts offenses committed by individuals 21 years of age or younger if it has been more than 30 months since the sentencing occurred.⁴¹ However, the statute does not define the phrase "sentencing occurred." The FDIC proposes to interpret "sentencing occurred" to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed. The FDIC seeks public comment on the following topic: Is the FDIC's proposed interpretation of the phrase "sentencing occurred" appropriate?

4. *Foreign convictions and pretrial diversions.* Section 19 applies to "any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense."⁴² The phrase "criminal offense involving dishonesty" is defined in the statute but is silent as to whether it includes convictions and pretrial diversions for criminal offenses prosecuted by foreign authorities (foreign convictions).⁴³ The statute does not define "offense involving . . . breach of trust or money laundering." The FDIC's position has been that foreign convictions and pretrial diversions are included within the scope of section 19. There are strong public policy rationales for prohibiting persons who have been convicted of certain foreign criminal offenses (or entered into a pre-trial diversion program in connection with

⁴¹ 12 U.S.C. 1829(c)(1)(B).

⁴² 12 U.S.C. 1829(a)(1).

⁴³ See 12 U.S.C. 1829(g)(2).

such an offense) from becoming or continuing as an IAP or owning, controlling, or otherwise participating in the affairs of an insured depository institution. However, the FDIC acknowledges that there may be caselaw, statutory construction, and other arguments that support a reading of section 19 that would exclude foreign convictions and pretrial diversions from the scope of section 19. As such, the FDIC seeks public comment on the following topic: Does section 19 encompass foreign convictions and pretrial diversions? What support do commenters have for their position?

5. *Expungements, sealings, and dismissals.* The FHBA established a new statutory exemption for expunged, sealed, and dismissed convictions (collectively, “expungements”).⁴⁴ The FDIC’s current regulations contain more expansive language concerning expungements than the statutory text. Notably, the FDIC’s expungement provisions encompass all convictions that had been expunged—whether by court order or otherwise by operation of law. The statutory language does not mention expungements “by operation of law”—as opposed to through a court order. The proposed rule incorporates the new statutory language but also maintains the FDIC’s broad interpretation of “expungement” to encompass covered offenses that have been expunged by operation of law. The FDIC seeks public comment on the following topic: Given the new statutory exemption for expunged offenses, is the FDIC’s more expansive proposed interpretation of expungement—which term includes records that have been expunged by application of law—appropriate?

6. *Offenses involving controlled substances.* The FHBA states that “offenses involving the possession of controlled substances” are not included within the definition of “criminal offense involving dishonesty” and, therefore, are not subject to section 19’s prohibition.⁴⁵ The proposed rule includes this definitional exclusion and notes that the

⁴⁴ See 12 U.S.C. 1829(c)(2).

⁴⁵ 12 U.S.C. 1829(g)(2)(C)(ii).

FDIC interprets the phrase “offenses involving the possession of controlled substances” to include, at a minimum, the offenses of simple possession of controlled substances and possession with intent to distribute controlled substances. This interpretation would mark an expansion from the FDIC’s current section 19 regulations, which only provide an exclusion for the simple possession of controlled substances. At the same time, this interpretation would track the statutory language of “offenses involving the possession of controlled substances” by encompassing the offense of *possession* with intent to distribute controlled substances. The FDIC seeks public comment on the following topic: Is the FDIC’s interpretation of “offense[s] involving the possession of controlled substances” as applying, at a minimum, to simple possession and possession with intent to distribute appropriate?

7. *De minimis offenses.* The FHBA states that the FDIC may exempt by rule certain *de minimis* offenses from section 19’s prohibition. The FDIC considers *de minimis* offenses to be covered offenses for which an application is not required because the FDIC deems the application automatically granted. The FDIC has previously promulgated rules that specified *de minimis* offenses under section 19.⁴⁶ However, given this new statutory language, the FDIC is reevaluating its current approach to *de minimis* offenses. Accordingly, the FDIC seeks public comment on the following topic: Is the FDIC’s current approach to *de minimis* offenses appropriate? Are there additional offenses that the FDIC should consider *de minimis* under section 19? Please provide support for such a designation.

8. Written comments must be received by the FDIC no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

VI. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

⁴⁶ See 12 CFR 303.227.

In accordance with the requirements of the Paperwork Reduction Act (PRA),⁴⁷ the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The FDIC is revising its section 19 application form to conform with the changes to section 19 under the FHBA. These changes will amend the FDIC's existing information collection associated with this proposed rule, entitled "Application Pursuant to Section 19 of the Federal Deposit Insurance Act" (3064-0018). For this reason, the information-collection requirements contained in this proposed rule will be submitted by the FDIC to OMB for review and approval under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and § 1320.11 of the OMB's implementing regulations (5 CFR part 1320). Based on available data, the number of respondents and the estimated annual burden associated with the information collection will decrease. Comments are invited on:

- (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility;
- (b) The accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used;
- (c) Ways to enhance the quality, utility, and clarity of the information to be collected;
- (d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and
- (e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on the collection

⁴⁷ 44 U.S.C. 3501 *et seq.*

of information should be sent to the address listed in the ADDRESSES section of this document. A copy of the comments may also be submitted to the OMB desk officer: By mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503, or by facsimile to 202-395-6974; or email to oira_submission@omb.eop.gov, Attention, Federal Banking Agency Desk Officer.

Information Collection

Title: “Application Pursuant to Section 19 of the Federal Deposit Insurance Act”.

OMB Number: 3064-0018.

Affected Public: Insured depository institutions and individuals.

Summary of Estimated Annual Burdens (OMB No. 3064-0018)						
IC Description	Type of Burden (Obligation to Respond)	Frequency of Response	Number of Respondents	Number of Responses / Respondent	Hours per Response	Annual Burden (Hours)
Application Pursuant to Section 19 of the Federal Deposit Insurance Act	Reporting (Required to obtain or retain benefits)	On occasion	76	1	16	1,216
Total Annual Burden Hours:						1,216
Source: FDIC						

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities.⁴⁸ However, an initial regulatory flexibility analysis is not required if the agency certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined “small entities” to include banking organizations with total assets of less than or equal to \$850 million.⁴⁹ Generally, the FDIC considers a significant

⁴⁸ 5 U.S.C. 601 *et seq.*

⁴⁹ The SBA defines a small banking organization as having \$850 million or less in assets, where an organization's “assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See 13 CFR 121.201 (as amended by 87 FR 69118, effective December

economic impact to be a quantified effect in excess of 5 percent of total annual salaries and benefits or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of one or more of these thresholds typically represent significant economic impacts for FDIC-supervised institutions.

As discussed further below, the FDIC certifies that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of FDIC-supervised small entities.

As of the quarter ending June 30, 2023, the FDIC insured 4,654 depository institutions, of which 3,373 are defined as small banking organizations for the purposes of the RFA.⁵⁰ In the period from 2020 through 2022, the FDIC received 9 bank-sponsored section 19 applications from small, FDIC-insured institutions, an average of 3 per year. Additionally, the FDIC received 202 section 19 applications from individuals during the same period, an average of about 67 per year.⁵¹ To determine the maximum number of small, FDIC-insured institutions that could be affected by the proposed rule, this analysis assumes that each applicant is seeking employment at a different bank and that each bank is a small, FDIC-insured institution. Based on these assumptions, 70 (2.1 percent of) small, FDIC-insured institutions, on average, annually, could be affected by the proposed rule.⁵² Section 19 applications from individuals are compelled by the applicant's intent to seek employment at FDIC-insured institutions, many of which are not small. Therefore, the FDIC believes that the number of small, FDIC-insured institutions affected by the proposed rule is likely to be less than 70.

As discussed in the **SUPPLEMENTARY INFORMATION** section, the

19, 2022). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." See 13 CFR 121.103. Following these regulations, the FDIC uses an IDI's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the insured depository institution is "small" for the purposes of the RFA.

⁵⁰ FDIC Call Report, March 31, 2023.

⁵¹ FDIC Application Tracking System.

⁵² $(70 / 3,433) * 100 = 2.04$ percent.

proposed rule would align the FDIC's regulations with the FHBA's provisions, make additional changes to further clarify the FDIC's regulations related to section 19, more closely align the FDIC's section 19 regulations with those of other Federal financial regulators, and make a number of non-substantive, technical edits. Most of the proposed changes were precipitated by the FHBA—which was effective immediately upon passage—and the proposed rule aligns the FDIC's regulations with these elements of the FHBA; therefore, most of the associated changes in the proposed rule will have no direct effect on individuals or IDIs. Further, since the FDIC estimates that a maximum of 70 small, FDIC-insured institutions could be affected by the proposed rule, on average, annually, any direct affects realized as a result of the proposed rule are likely to be small and affect a relatively small number of entities.

In light of the foregoing, the FDIC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this proposed rule have any significant effects on small entities that the FDIC has not identified?

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act⁵³ requires each Federal banking agency (FBA) to use plain language in its proposed and final rules published after January 1, 2000. The FDIC has sought to present the proposed rule in a simple and straightforward manner. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?

⁵³ Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (1999), 12 U.S.C. 4809.

- Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

D. Riegle Community Development and Regulatory Improvement Act of 1994

Under section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),⁵⁴ in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on IDIs, each FBA must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of the RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.⁵⁵ The FDIC invites comments that further will inform its consideration of RCDRIA.

List of Subjects

12 CFR Part 303

Administrative practice and procedure, Bank deposit insurance, Banks, banking,

⁵⁴ 12 U.S.C. 4802(a).

⁵⁵ 12 U.S.C. 4802.

Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties, Savings associations.

Authority and Issuance

For the reasons stated in the preamble and under the authority of 12 U.S.C. 1819 (Seventh and Tenth), the FDIC proposes to amend 12 CFR parts 303 and 308 as follows:

PART 303—FILING PROCEDURES

1. The authority citation for part 303 is revised to read as follows:

Authority: 12 U.S.C. 378, 1464, 1813, 1815, 1817, 1818, 1819(a) (Seventh and Tenth), 1820, 1823, 1828, 1829, 1831a, 1831e, 1831o, 1831p-1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5414, 5415, and 15 U.S.C. 1601–1607.

2. Revise subpart L, consisting of §§ 303.220 through 303.231, to read as follows:

Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of, or Who Have Program Entries for, Certain Criminal Offenses)

Sec.

303.220 What is section 19 of the Federal Deposit Insurance Act?

303.221 Who is covered by section 19?

303.222 Which offenses qualify as “Covered Offenses” under section 19?

303.223 What constitutes a conviction under section 19?

303.224 What constitutes a pretrial diversion or similar program under section 19?

303.225 What are the types of applications that can be filed?

303.226 When may an application be filed?

303.227 *De minimis* offenses.

303.228 How to file an application.

303.229 How an application is evaluated.

303.230 What will the FDIC do if the application is denied?

303.231 Waiting time for a subsequent application if an application is denied.

§ 303.220 What is section 19 of the Federal Deposit Insurance Act?

(a) This subpart covers applications under section 19 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1829. The FDIC refers to such applications as “consent applications.” Under section 19, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for such offense (collectively, Covered Offenses), may not become, or continue as, an institution-affiliated party (IAP) of an insured depository institution (IDI); own or control, directly or indirectly, any IDI; or otherwise participate, directly or indirectly, in the conduct of the affairs of any IDI without the prior written consent of the FDIC.

(b) In addition, the law prohibits an IDI from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. IDIs must therefore make a reasonable, documented inquiry to verify an applicant’s history to ensure that a person who has a Covered Offense under section 19 is not hired or permitted to participate in its affairs without the written consent of the FDIC issued under this subpart. FDIC-supervised IDIs may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the institution to determine if the applicant is prohibited under section 19, but the applicant may not work for, be employed by, or otherwise participate in the affairs of the IDI until the IDI has determined that the applicant is not prohibited under section 19.

(c) If there is a conviction or program entry covered by the prohibitions of section

19, an application under this subpart must be filed seeking the FDIC's consent to become, or to continue as, an IAP; to own or control, directly or indirectly, an IDI; or to otherwise participate, directly or indirectly, in the affairs of the IDI. The application must be filed, and consented to, prior to serving in any of the foregoing capacities unless such application is not required under the subsequent provisions of this subpart. The purpose of an application is to provide the applicant an opportunity to demonstrate that, notwithstanding the prohibition, a person is fit to participate in the conduct of the affairs of an IDI without posing a risk to its safety and soundness or impairing public confidence in that institution. The burden is upon the applicant to establish that the application warrants approval.

§ 303.221 Who is covered by section 19?

(a) Persons covered by section 19 include IAPs, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an IDI. Therefore, all directors, officers, and employees of an IDI who fall within the scope of section 19, including *de facto* employees, as determined by the FDIC based upon generally applicable standards of employment law, will also be subject to section 19. Whether other persons are covered by section 19 depends upon their degree of influence or control over the management or affairs of an IDI. For example, section 19 would apply to an officer or director of an IDI's holding company to the extent that they have the power to define and direct the management or affairs of an IDI. Similarly, directors and officers of affiliates, subsidiaries, or joint ventures of an IDI or its holding company will be covered if they participate in the affairs of the IDI or are in a position to influence or control the management or affairs of the IDI. Typically, an independent contractor does not have a relationship with the IDI other than the activity for which the institution has

contracted. However, an independent contractor who influences or controls the management or affairs of the IDI would be covered by section 19.

(b) The term *person*, for purposes of section 19, means an individual, and does not include a corporation, firm, or other business entity.

(c) Individuals who file an application with the FDIC under the provisions of section 19 who also seek to participate in the affairs of a bank holding company or savings and loan holding company may have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. 1829(d) and (e).

(d) Section 19 specifically prohibits a person subject to its provisions from owning or controlling, directly or indirectly, an IDI. The terms *control* and *ownership* under section 19 shall have the meaning given to those terms in subpart E of this part (including the rebuttable presumptions stated in subpart E).

(1) A person will be deemed to exercise “control” if that person—

(i) Has the ability to direct the management or policies of an IDI;

(ii) Has the power to vote 25 percent or more of the voting shares of an IDI; or

(iii) Has the power to vote 10 percent of the voting shares of an IDI if—

(A) No other person owns, controls, or has the power to vote more shares; or

(B) The institution has registered securities under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l).

(2) Under this paragraph (d), a person will be deemed to “own” an IDI if that person owns—

(i) 25 percent or more of the institution’s voting stock; or

(ii) 10 percent of the voting shares if—

(A) No other person owns more; or

(B) The institution has registered securities under section

12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l).

(3) The standards in this paragraph (d) would also apply to an individual acting in concert with others so as to have such ownership or control.

Absent the FDIC's consent, persons subject to the prohibitions of section 19 must divest their control or ownership of shares above the foregoing limits.

§ 303.222 Which offenses qualify as “Covered Offenses” under section 19?

(a) *Categories of Covered Offenses.* The conviction or program entry must be for a criminal offense involving dishonesty, breach of trust, or money laundering.

(1) The term *criminal offense involving dishonesty*—

(i) Means an offense under which an individual, directly or indirectly—

(A) Cheats or defrauds; or

(B) Wrongfully takes property belonging to another in violation of a criminal statute;

(ii) Includes an offense that Federal, State, or local law defines as dishonest, or for which dishonesty is an element of the offense; and

(iii) Does not include—

(A) A misdemeanor criminal offense committed more than one year before the date on which an individual files a consent application, excluding any period of incarceration; or

(B) An offense involving the possession of controlled

substances. At a minimum, this exclusion applies to criminal offenses involving the simple possession of a controlled substance and possession with intent to distribute a controlled substance. This exclusion may also apply to other drug-related offenses depending on the statutory elements of the offenses or from court determinations that the statutory provisions of the offenses do not involve dishonesty, breach of trust, or money laundering, as noted in paragraph (b) of this section. Potential applicants may contact their appropriate FDIC Regional Office if they have questions about whether their offenses are covered under section 19.

(iv) The term *offense committed* in paragraph (a)(1)(iii)(A) of this section means the last date of the underlying misconduct. In instances with multiple offenses, *offense committed* means the last date of any of the underlying offenses.

(2) The term *breach of trust* means a wrongful act, use, misappropriation, or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission.

(b) *Elements of the offense.* Whether a crime involves dishonesty, breach of trust, or money laundering will be determined from the statutory elements of the offense itself or from court determinations that the statutory provisions of the offense involve dishonesty, breach of trust, or money laundering.

(c) *Certain older offenses excluded—(1) Exclusions for certain older offenses.*

Section 19 does not apply to an offense if—

- (i) It has been 7 years or more since the offense occurred; or
- (ii) The individual was incarcerated with respect to the offense and it has been 5 years or more since the individual was released from incarceration.
- (iii) The term *offense occurred* means the last date of the underlying misconduct. In instances with multiple Covered Offenses, *offense occurred* means the last date of any of the underlying offenses.

(2) *Offenses committed by individuals 21 year of age or younger.* For individuals who committed an offense when they were 21 years of age or younger, section 19 does not apply to the offense if it has been more than 30 months since the sentencing occurred. The term *sentencing occurred* means the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed.

(3) *Limitation.* This paragraph (c) does not apply to an offense described under 12 U.S.C. 1829(a)(2).

(d) *Designated lesser offenses excluded.* Section 19 does not apply to the following offenses, if one year or more has passed since the applicable conviction or program entry: using fake identification; shoplifting; trespassing; fare evasion; and driving with an expired license or tag.

(e) *Foreign convictions.* Individuals who are convicted of or enter into a pretrial diversion program for a criminal offense involving dishonesty, breach of trust, or money laundering in any foreign jurisdiction are subject to section 19, unless the offense is otherwise excluded by this subpart.

§ 303.223 What constitutes a conviction under section 19?

(a) *Convictions requiring an application.* There must be a conviction of record.

Section 19 does not cover arrests or pending cases not brought to trial, unless the person has a program entry as set out in § 303.224. Section 19 does not cover acquittals or any conviction that has been reversed on appeal, unless the reversal was for the purpose of re-sentencing. A conviction with regard to which an appeal is pending requires an application. A conviction for which a pardon has been granted will require an application.

(b) *Convictions not requiring an application.* When an individual is charged with a Covered Offense and, in the absence of a program entry as set out in § 303.224, is subsequently convicted of an offense that is not a Covered Offense, the conviction is not subject to section 19.

(c) *Expungement, dismissal, and sealing.* A conviction is not considered a conviction of record and does not require an application if—

(1) There is an order of expungement, sealing, or dismissal that has been issued in regard to the conviction in connection with such offense, or if a conviction has been otherwise expunged, sealed, or dismissed by operation of law; and

(2) It is intended by the language in the order itself, or in the legislative provisions under which the order was issued, or in other legislative provisions, that the conviction shall be destroyed or sealed from the individual's State, Tribal, or Federal record, even if exceptions allow the conviction to be considered for certain character and fitness evaluation purposes.

(d) *Youthful offenders.* An adjudication by a court against a person as a “youthful offender” (or similar term) under any youth-offender law applicable to minors as defined by state law, or any judgment as a “juvenile delinquent” (or similar term)

by any court having jurisdiction over minors as defined by State law, does not require an application. Such an adjudication does not constitute a matter covered under section 19 and is not a conviction or program entry for determining the applicability of § 303.227.

§ 303.224 What constitutes a pretrial diversion or similar program under section 19?

(a) The term *pretrial diversion or similar program* (program entry) means a program characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement by the accused to restitution, drug or alcohol rehabilitation, anger management, or community service. Whether the outcome of a case constitutes a program entry is determined by relevant Federal, State, or local law, and, if not so designated under applicable law, then the determination of whether a disposition is a program entry will be made by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by section 19.

(b) When a Covered Offense either is reduced by a program entry to an offense that would otherwise not be covered by section 19 or is dismissed upon successful completion of a program entry, the offense remains a Covered Offense for purposes of section 19. The Covered Offense will require an application unless it is *de minimis* as provided by § 303.227.

(c) Expungements, dismissals, or sealings of program entries will be treated the same as those for convictions.

§ 303.225 What are the types of applications that can be filed?

(a) The FDIC will accept applications from—

- (1) An individual;
- (2) An IDI applying on behalf of an individual;

(3) A depository institution holding company applying on behalf of an individual with respect to an IDI subsidiary of the holding company; and

(4) A depository institution holding company applying on behalf of an individual who will work at the holding company but also participate in the affairs of the IDI or who would be in a position to influence or control the management or affairs of the IDI, in accordance with § 303.221(a).

(b) An individual or an institution may file applications at separate times. Under either approach, the application(s) must be filed with the appropriate FDIC Regional Office, as required by this subpart.

§ 303.226 When may an application be filed?

Except for situations in which no application is required under section 19 and this subpart, an application must be filed when there is a conviction by a court of competent jurisdiction for a Covered Offense by any adult or minor treated as an adult, or when such person has a program entry regarding that offense. Before an application may be filed, all of the sentencing requirements associated with a conviction, or conditions imposed by the program entry, including but not limited to, imprisonment, fines, conditions of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction. The FDIC's application forms as well as additional information concerning section 19 can be accessed at the FDIC's Regional Offices or on the FDIC's website.

§ 303.227 *De minimis* offenses.

(a) *In general.* Approval is automatically granted and an application will not be required where all of the following *de minimis* criteria are met.

(1) The individual has been convicted of, or has program entries for, no more than two Covered Offenses, including those subject to paragraph (b) of this section; and for each Covered Offense, all of the sentencing

requirements associated with the conviction, or conditions imposed by the program entry, have been completed (the sentence- or program-completion requirement does not apply under paragraph (b)(2) of this section).

(2) For each Covered Offense, the individual could have been sentenced to a term of confinement in a correctional facility of three years or less and/or a fine of \$2,500 or less, and the individual actually served three days or less of jail time for each Covered Offense.

(3) Jail time under paragraph (a)(2) of this section is calculated based on the time an individual spent incarcerated as a punishment or a sanction—not as pretrial detention—and does not include probation or parole where an individual was restricted to a particular jurisdiction or was required to report occasionally to an individual or a specific location. Jail time includes confinement to a psychiatric treatment center in lieu of a jail, prison, or house of correction on mental-competency grounds. The definition is not intended to include either of the following: persons who are restricted to a substance-abuse treatment program facility for part or all of the day; or persons who are ordered to attend outpatient psychiatric treatment.

(4) If there are two convictions or program entries for a Covered Offense, each conviction or program entry was entered at least three years prior to the date an application would otherwise be required, except as provided in paragraph (b)(1) of this section, and each Covered Offense was not committed against an IDI or insured credit union.

(b) Other types of offenses for which the de minimis exception applies and no application is required—(1) Age of person at time of Covered Offense. If there are

two convictions or program entries for a Covered Offense, and the actions that resulted in both convictions or program entries all occurred when the individual was 21 years of age or younger, then the *de minimis* criteria in paragraph (a)(3) of this section shall be met if the convictions or program entries were entered at least 18 months prior to the date an application would otherwise be required.

(2) *Convictions or program entries for insufficient funds checks.*

Convictions or program entries of record based on the writing of “bad” or insufficient funds check(s) shall be considered *de minimis* offenses under this provision if the following conditions apply:

- (i) The aggregate total face value of all “bad” or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for “bad” or insufficient funds checks is \$2,000 or less;
- (ii) No IDI or insured credit union was a payee on any of the “bad” or insufficient funds checks that were the basis of the conviction(s) or program entry(ies); and
- (iii) The individual has no more than one other *de minimis* offense under this section.

(3) *Convictions or program entries for small-dollar, simple theft.*

Convictions or program entries based on the simple theft of goods, services, or currency (or other monetary instrument) shall be considered *de minimis* offenses under this paragraph (b) if the following conditions apply:

- (i) The value of the currency, goods, or services taken is \$1,000 or less;
- (ii) The theft was not committed against an IDI or insured credit union;

(iii) The individual has no more than one other *de minimis* offense under this section; and

(iv) If there are two *de minimis* offenses under this section, each conviction or program entry was entered at least three years prior to the date an application would otherwise be required, or at least 18 months prior to the date an application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger.

(v) Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

(c) *Fidelity bond coverage and disclosure to institutions.* Any person who meets the criteria under this section shall be covered by a fidelity bond to the same extent as others in similar positions, and must disclose the presence of the conviction(s) or program entry(ies) to all IDIs in the affairs of which that person intends to participate.

(d) *Non-qualifying convictions or program entries.* No conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. 1829(a)(2) can qualify under any of the *de minimis* exceptions set out in this section.

§ 303.228 How to file an application.

Forms and instructions should be obtained from the FDIC's website (www.fdic.gov), and the application(s) must be filed with the appropriate FDIC Regional Office. An application may be filed by an individual and by an IDI or depository institution holding company on behalf of an individual. The appropriate Regional Office for an institution-sponsored application is the office covering the state where the institution's home office is located. The appropriate Regional Office for an individual

application is the office covering the state where the person resides. States covered by each FDIC Regional Office can be located on the FDIC's website.

§ 303.229 How an application is evaluated.

(a) *Criminal-history records.* In reviewing an application, the FDIC will—

(1) Primarily rely on the criminal history record of the Federal Bureau of Investigation (rap sheet); and

(2) Provide such record to the applicant to review for accuracy.

(b) *Certified copies.* The FDIC will not require an applicant to provide certified copies of criminal history records unless the FDIC determines that there is a clear and compelling justification to require additional information to verify the accuracy of the criminal history record of the Federal Bureau of Investigation.

(c) *Ultimate determinations.* The ultimate determinations in assessing an application are whether the person has demonstrated their fitness to participate in the conduct of the affairs of an IDI, and whether the affiliation, ownership, control, or participation by the person in the conduct of the affairs of the institution may constitute a threat to the safety and soundness of the institution or the interests of its depositors or threaten to impair public confidence in the institution.

(d) *Individualized assessment.* When evaluating applications, the FDIC will conduct an individualized assessment that will consider:

(1) Whether the conviction or program entry is subject to section 19, and the specific nature and circumstances of the offense;

(2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the IDI constitutes a threat to the safety and soundness of the institution or the interests of its depositors or threatens to impair public confidence in the institution;

(3) Evidence of rehabilitation, including the applicant's age at the time of the conviction or program entry, the time that has elapsed since the conviction or program entry, and the relationship of the individual's offense to the responsibilities of the applicable position;

(4) The individual's employment history, letters of recommendation, certificates documenting participation in substance-abuse programs, successful participating in job preparation and educational programs, and other relevant evidence;

(5) The ability of management of the IDI to supervise and control the person's activities;

(6) The level of ownership or control the person will have of an IDI;

(7) The applicability of the IDI's fidelity bond coverage to the person; and

(8) Any additional factors in the specific case that appear relevant to the application or the applicant including, but not limited to, the opinion or position of the primary Federal or State regulator.

(e) *No re-consideration of guilt.* The question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 308, subpart M.

(f) *Factors considered for enumerated offenses.* The foregoing factors will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban prior to its expiration date under 12 U.S.C. 1829(a)(2) for certain Federal offenses.

(g) *Mandatory conditions of approval.* All approvals and orders will be subject to the condition that the person be covered by a fidelity bond to the same extent as

others in similar positions. If the FDIC has approved an application filed by an individual and has issued a consent order, the individual must disclose the presence of the conviction(s) or program entry(ies) to all IDIs in the affairs of which they wish to participate.

(h) *Institution-sponsored applications: work at same employer.* When deemed appropriate by the FDIC, institution-sponsored applications are to allow the individual to work for the same employer (without restrictions on the location) and across positions, except that the prior consent of the FDIC (which may require a new application) will be required for any proposed significant changes in the individual's security-related duties or responsibilities, such as promotion to an officer or other positions that the employer determines will require higher security screening credentials.

(i) *Work at a different employer after certain approvals.* In situations in which an approval has been granted for a person to participate in the affairs of a particular IDI and the person subsequently seeks to participate at another IDI, another application must be submitted and approved by the FDIC prior to the person participating in the affairs of the other IDI.

§ 303.230 What will the FDIC do if the application is denied?

(a) The FDIC will inform the applicant in writing that the application has been denied and summarize or cite the relevant considerations specified in § 303.229.

(b) The denial will also notify the applicant that a written request for a hearing under 12 CFR part 308, subpart M, may be filed with the FDIC Executive Secretary within 60 days after the denial. The request for a hearing must include the relief desired, the grounds supporting the request for relief, and any supporting evidence.

§ 303.231 Waiting time for a subsequent application if an application is denied.

(a) An application under section 19 may be made in writing at any time more than one year after the issuance of a decision denying an application under section 19. If the original denial is subject to a request for a hearing, then the subsequent application may be filed at any time more than one year after the decision of the FDIC Board of Directors, or its designee, denying the application. Unless with the passage of time the individual is no longer subject to section 19, the prohibition against participating in the affairs of an IDI under section 19 shall continue until the individual has been granted consent in writing to participate in the affairs of an IDI by the Board of Directors or its designee.

(b) An institution-sponsored application is not subject to the one-year waiting period if the application—

(1) Follows the denial of an individual application; or

(2) Follows the denial of an institution-sponsored application and the subsequent application is sponsored by a different institution or is for a different position.

PART 308—RULES OF PRACTICE AND PROCEDURE

3. The authority citation for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109–351, 120 Stat. 1966; Pub. L. 111–203, 124 Stat. 1376; Pub. L. 114–74, sec. 701, 129 Stat. 584.

4. Revise § 308.156 to read as follows:

§ 308.156 Scope.

The rules and procedures set forth in this subpart shall apply to an application

filed under section 19 of the FDI Act, 12 U.S.C. 1829 (section 19), and 12 CFR part 303, subpart L, by an insured depository institution (IDI), depository institution holding company, or an individual (any of which could be termed an applicant). Section 19 states that if an individual has been convicted of any criminal offense involving dishonesty, a breach of trust, or money laundering, or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution of such offense, the individual must seek the prior written consent of the FDIC to: become or continue as an institution-affiliated party (IAP) with respect to an IDI; own or control directly or indirectly an IDI; or participate directly or indirectly in any manner in the conduct of the affairs of an IDI. This subpart shall apply only after such application has been denied under 12 CFR part 303, subpart L.

5. Amend § 308.158 by revising paragraphs (b) and (d) through (f) to read as follows:

§ 308.158 Hearings.

* * * * *

(b) *Burden of proof.* The burden of going forward with a *prima facie* case shall be upon the FDIC. The ultimate burden of proof shall be upon the applicant seeking the FDIC's consent for an individual to: become or continue as an IAP with respect to an IDI; own or control directly or indirectly an IDI; or participate directly or indirectly in any manner in the conduct of the affairs of an IDI.

* * * * *

(d) *Written submissions in lieu of hearing.* The applicant may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of a hearing. If a

hearing is waived, and if there has not been a written submission in lieu of a hearing, the individual shall remain prohibited under section 19.

(f) *Decision by Board of Directors or its designee.* Within 60 days following the Administrative Officer's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the applicant whether the individual shall remain prohibited under section 19. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on October 24, 2023.

James P. Sheesley,

Assistant Executive Secretary.

BILLING CODE 6714-01-P

[FR Doc. 2023-23853 Filed: 11/13/2023 8:45 am; Publication Date: 11/14/2023]